DEC 21 1953
HAROLD B. WILLEY, C

Supreme Court of the United States

OCTOBER TERM, 1953

No. 69

DR. EDWARD K. BARSKY,

Appellant,

against

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK.

BRIEF FOR APPELLEE

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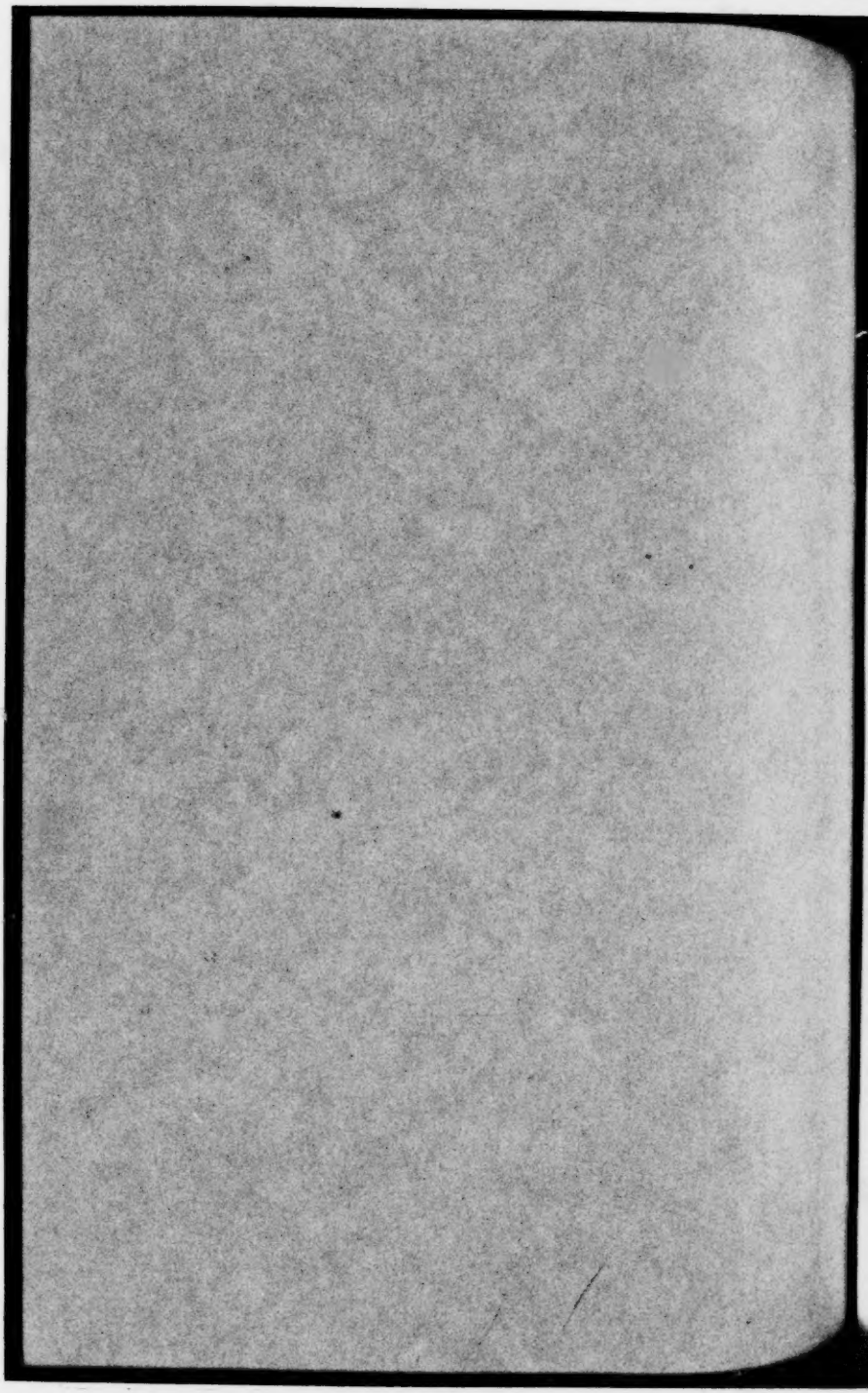

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BRIEF FOR THE BOARD OF REGENTS, APPELLEE

The appellant, Dr. Barsky, is licensed to practice medicine in the State of New York.

A statutory provision related to the one under which he is licensed provides for disciplinary action against a doctor if he:

> "has been convicted in a court of competent jurisdiction, either within or without this state, of a crime."

Dr. Barsky was convicted in 1947 of contempt of Congress, which is defined in 2 U. S. C. § 192. The conviction was in the District Court of the United States for the District of Columbia. Affirmance by the Court of Appeals and denial of certiorari by this Court left no doubt that the conviction was in "a court of competent jurisdiction".

Barsky et al. v. *United States,* 167 F. 2d 241; 334 U. S. 843 mem. and 339 U. S. 971 mem.

The statute quoted above was invoked by appropriate administrative proceedings and the Board of Regents determined on September 28, 1951, that Dr. Barsky's medical license should be suspended for six months (R. 59-60).

Dr. Barsky then filed a petition in the New York courts by which he entered upon a course of judicial review. Although the New York practice act does not specifically require that such a petition state the questions of law relied upon (C. P. A. § 1288) the general rule is that an issue of constitutionality will not be considered subsequently if not raised by the petition. *Matter of Thomas* v. *Bd. of Standards and Appeals,* 290 N. Y. 109 (1943); *Matter of Robusto* v. *Tibbetts,* 277 App. Div. 1008 mem. (2d Dept. 1950). Dr. Barsky's petition did not suggest any constitutional question (R. 13-28, particularly paragraph XVII at R. 26) and no constitutional question had been suggested during the administrative phases of the proceeding. That is to say, before the Medical Grievance Committee and the Regents Committee and the Board of Regents Dr. Barsky had conceded the constitutionality of the statute under which they were acting, so far as silence was a concession. Likewise his only pleading before the courts stated no constitutional grounds.

The first mention of any constitutional question was at page 82 of Dr. Barsky's brief before the Appellate Division, Third Department. That Court made no mention of any such question in its memorandum or in the opinion mentioned therein. *Matter of Barsky* v. *Bd. of Regents,* 279 App. Div. 1117 mem.; also 279 App. Div. 447.

Dr. Barsky appealed to the Court of Appeals of New York State and again presented constitutional questions

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incidental to some serious questions of statutory interpretation. The highest court of the State interpreted the statute as applying to Dr. Barsky's case and upheld the determination of suspension. *Matter of Barsky* v. *Bd. of Regents*, 305 N. Y. 89, also R. 64-80. The only mention of constitutional questions is in one of the final paragraphs of Judge Fuld's dissenting opinion, found at R. 79 and at pages 108-109 of 305 N. Y.

The Court of Appeals has certified by amendment of its remittitur that questions under the Fourteenth Amendment were presented and necessarily passed upon. R. 82, also 305 N. Y. 691 mem. This Court has found probable jurisdiction.

Accordingly, this brief will be directed to the eight points of the Appellant's Brief. It will be arranged under corresponding point numbers. By confining it to constitutional issues, without any restatement of contentions of fact and of statutory interpretation that are irrelevant in this Court, some economy of paging may be possible.

POINT I

The statute is not vague

Doctors, lawyers and dentists are treated substantially alike under New York statutes. See the tabulation at the back of this brief.

If a licensee is convicted of a felony he loses his professional status. Revocation is mandatory. No hearing is necessary and there is no discretion. "Felony" is somewhat limited in meaning for that purpose. Since 1926 in the case of doctors, and since 1940 in the case of lawyers,

conviction of a "felony" means conviction of an offense which if committed within New York State would constitute a felony under its laws.*

If a licensee is convicted of a "crime" (obviously meaning, in the context, a crime which is not a felony for purposes of peremptory revocation) he is subject to disciplinary action ranging from censure to revocation. In such cases there must be a hearing and an appropriate body is given discretion to determine what measure of discipline, if any, should be imposed. For lawyers this discretionary power rests with the Appellate Division, a court of five judges. For doctors and dentists it rests with the Board of Regents and subordinate bodies representing the respective professions. For all three professions conviction of a "crime" includes convictions by courts outside the State and there is no requirement that "moral turpitude" or professional activities be a factor in the crime.*

If it would serve any useful purpose a great body of similar law in New York State and elsewhere could be shown. These laws are not new. The idea that they are constitutionally objectionable has been a long time reaching this Court.

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* That the scope of the statute about doctors formerly was broader can be seen in Public Health Law (N. Y.) § 161 before its general revision by L. 1926, c. 834. For a long list of peremptory disbarments based on Federal convictions for felonies before *Matter of Donegan*, 282 N. Y. 285 (1940), see a note in 79 A. L. R. 39. The statute about dentists still uses the word "include" instead of "be" and apparently still has the broader meaning. See the tabulation at the back of this brief.

* Disbarments since 1940 which have followed Federal convictions for offenses having no exact counterpart under New York law include: *Matter of Greenberger*, 265 App. Div. 343 (1942, draft evasion); *Matter of Turley*, 268 App. Div. 706 (1945, transporting stolen securities in interstate commerce); *Matter of Butcher*, 269 App. Div. 545 (1945, embezzlement of mail by p. o. employee); *Matter of Hiss*, 276 App. Div. 701 (1950, perjury before Federal grand jury).

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It is argued that the statutory provisions now involved are "so vague, unlimited, indefinite, capricious and contradictory, and their meaning so uncertain, that their enforcement violates the due process clause of the Fourteenth Amendment". Appellant's Brief, page 27. It seems fairly clear that no such vagueness can be in the word "crime". Indeed, it would be time to stop using printed English as a means of attempting communication if there were unconstitutional vagueness anywhere in the language:

> "has been convicted in a court of competent jurisdiction, either within or without this state, of a crime."

Compare the foregoing with the statutory language which was upheld against the charge of vagueness in *Mahler* v. *Eby*, 264 U. S. 32 (1924); *Patterson* v. *Stanolind*, 305 U. S. 376 (1939); *U. S.* v. *Rock Royal Co-op.*, 307 U. S. 533 (1939); *Adler* v. *Board of Education*, 342 U. S. 485 (1952) and *Beauharnais* v. *Illinois*, 343 U. S. 250 (1952). It is odd that the Appellant's Brief argues that it is a vice of the present statute that it is not limited to a "crime involving moral turpitude". A statute turning upon that phrase gave this Court some trouble in *Jordan* v. *DeGeorge*, 341 U. S. 223 (1951).

Appellant's Brief argues that the statute is unconstitutional insofar as it gives the Board of Regents a broad discretion as to the measure of discipline. There is nothing novel or extraordinary about this power. It existed in New York and other states as long ago as 1898, when *Hawker* v. *New York*, 170 U. S. 189, was before this Court. See the provisions summarized in a footnote, pages 191-193. It is the power which an Appellate Division has over lawyers, and it exists in many forms. The power to do justice in a wide variety of individual cases necessarily implies the

power to choose broadly. The ideal of "a government of laws" is not written into the Constitution so specifically as to compel Procrustean uniformity.

POINT II

The statute is reasonably related to the practice of medicine.

Raab v. *State Medical Board*, 342 U. S. 944 mem. (1952), was a denial of certiorari to review the decision of the Supreme Court of Ohio reported at 156 Ohio St. 158, 101 N. E. 2d 294. The petitioner was an Ohio doctor whose license was revoked by the State Board under a statute which gave discretion to suspend or revoke if the licensee was "guilty of felony". Dr. Raab was convicted in a United States District Court for evading Federal income tax. Although the Ohio statute did not apply specifically to other than State felonies the Supreme Court of Ohio interpreted it as being applicable in that case, saying:

> "Citizens and residents of Ohio, as they go about their daily work or pursue their professions are subject to the laws of the United States as well as the laws of Ohio. They are protected by both and must pay the penalty for violation of either. The operation of the federal courts in Ohio is necessary for the good of Ohio citizens. The enforcement of federal statutes in Ohio is as necessary as the enforcement of Ohio statutes. No one would deny that every Ohio citizen is amenable to the federal income tax laws."

Similarly, violations of Federal law are not a matter of unconcern to New York State. See, upon that subject, the observations of Judge Lehman in *People* v. *Lafaro*, 250 N. Y. 336 (1929). See, also the dissenting opinion of Judge Loughran in 282 N. Y. at page 295. For certain purposes the statutes of the State mandate conse-

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quences based upon convictions or acquittals in other states or the Federal courts. See Correction Law § 617; Code Crim. Pro. § 139; Penal Law § 33, § 1941, § 1942; Election Law § 152, subd. 4. Surrogate's Court Act § 94, subd. 4, disqualifies a "felon" from serving as executor, administrator, trustee or guardian. This provision has recently been applied to a New Jersey conviction, notwithstanding that the offense was only a misdemeanor in New Jersey, it being a felony in New York. *Matter of Johnson*, 202 Misc. 751 (1952).

Convictions outside the State frequently are acted upon relative to professional licensing. Professional status, like public office, is a special trust. One who is a bad citizen may or may not be capable in law or medicine or dentistry but limits are set to the discredit he can bring upon his fellow practitioners. In New York State, and many other states, those limits are fixed no more exactly than to confer upon certain bodies representative of each profession the power to purge from it or otherwise discipline those who are convicted of crime, within or without the state. There is no constitutional reason why New York State cannot thus act against any professional man who is a bad citizen, under its own laws or those of the United States.

POINT III

The alleged errors of the administrative bodies in receipt and consideration of evidence do not render the suspension unconstitutional.

Point III of the Appellant's Brief misstates the facts to allege an error and then transmutes the alleged error into a constitutional point. Discussing this matter leads us, by irritation, into a discursiveness thus far avoided. Consti-

tutionally, it is irrelevant if the Medical Grievance Committee received some evidence it should not have received. The New York courts have decided that the evidence did not substantially affect the outcome, and this Court will not reopen that question of surmise.

The alleged admission that the Regents "ignored weighty considerations and acted on matters not proper for consideration" (App. Br. p. 49 citing R. 68) is found, when the citation is used, *not* to have been an admission by the Court of Appeals. It was merely "assertions by appellants". And the statutory provision in Education Law § 6515, subd. 5, quoted somewhat misleadingly in the same paragraph, is as follows:

> "The committee on grievances shall not be bound by the laws of evidence in the conduct of its proceedings, but the determination shall be founded upon sufficient legal evidence to sustain the same."

Nearly all that is in the 463 typed pages of the hearing record before the Medical Grievance Committee was oratory to persuade that Dr. Barsky was a humanitarian being persecuted for the breadth of his sympathies, or on the other hand that he was a dangerous subversive. He and his counsel set the standard of digression. The Committee could not limit it without being charged with having refused to hear Dr. Barsky's side of the case.

His motivation is a complex matter, perhaps beyond analysis by any human tribunal. It should be sufficient for the present to remember that he was told authoritatively that the Congressional inquiry was to find out whether the Anti-Fascist Committee was subversive and had spent on propaganda part of the considerable sums it had raised, and Dr. Barsky did what he could to thwart the inquiry.

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The Medical Grievance Committee summarized as follows its views on this topic, formed on the bulky vagrant record made before it:

> "We do not feel that we are now concerned, nor would we be able to determine, whether the books and records of that [Anti-Fascist] Committee would disclose whether the Committee was completely philanthropic in character, or whether it was engaged in subversive activities." (R. 33)

Those words were written on April 25, 1951. The Medical Grievance Committee knew that the Attorney General of the United States had listed the Anti-Fascist Committee as subversive (R. 33). Presumably it knew also of the non-unanimous decision in 1949 by the Court of Appeals of the District of Columbia (*Joint Anti-Fascist Refugee Committee* v. *Clark*, 177 F. 2d 79) and that certiorari had been granted by this Court (339 U. S. 910 mem.). The Medical Grievance Committee was unanimous in its recommendation that Dr. Barsky's medical license should be suspended, four members thinking three months suspension sufficient and six members recommending six months (R. 35).

The matter went then to the Regents Committee on Discipline, of which Robert M. Benjamin is chairman, the other members being Dr. Bauer and Susan Brandeis (R. 59). Chairman Benjamin, at least, is not a person to be swayed by a mere charge of subversion. While the present case had been before the Medical Grievance Committee he had been presenting the appeal of Alger Hiss before the Second Circuit and in an application to this Court (185 F. 2d 822, 340 U. S. 948 mem.). The decision by this Court that the Anti-Fascist Committee was improperly listed by the Attorney General (341 U. S. 123) came after the recommendation by the Medical Grievance Committee

FINALLY

It is respectfully submitted that the appeal should be dismissed or the judgment of the Court of Appeals should be affirmed.

Albany, December 16, 1953.

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	Doctors	*Lawyers*	*Dentists*
Felony conviction brings mandatory revocation	Whenever any practitioner, etc., shall be convicted of a felony as defined in § 6502 the registration of the person so convicted may be annulled and his license revoked by the department. (Ed. Law § 6514 subd. 1)	Any attorney who shall be convicted of a felony shall, upon such conviction, cease to be an attorney. (Judiciary Law § 90 subd. 4)	A conviction of felony shall forfeit a license to practice dentistry (Ed. Law § 6613 subd. 12)
Must it be New York felony?	The conviction of a felony shall be the conviction of any offense which if committed within the state of New York would constitute a felony under the laws thereof. (Ed. Law § 6502)	*In re Donegan*, 282 N. Y. 285	The conviction of a felony aforementioned shall include the conviction of a felony by any court in this state or by any court of the United States and in the event that a crime of which the practitioner is convicted by any court of the United States or by any other state is not a felony in the jurisdiction in which the conviction is had but is a felony in the state of New York, then the conviction shall be deemed a conviction of a felony for the purposes of this article. (Ed. Law § 6613 subd. 13)
Discretionary discipline if convicted of crime	The practitioner's license may be revoked or suspended or he may be censured if he has been convicted in a court of competent jurisdiction, within or without this state, of a crime. (Ed. Law § 6514 subd. 2)	The appellate division is authorized to censure, suspend from practice or remove from office any attorney who is guilty of a crime or misdemeanor. (Judiciary Law § 90 subd. 2)	The dentist's license may be revoked or suspended or he may be censured if he has been convicted in a court of competent jurisdiction, within or without this state, of a crime. (Ed. Law § 6613 subd. 2)